

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 32

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MERRIE BRITT

Appeal No. 1999-0635
Application No. 08/688,825¹

ON BRIEF

Before CALVERT, COHEN and BAHR, Administrative Patent Judges.
BAHR, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 2, 5 and 7 through 20, which are all of the claims pending in this application.²

¹ Application for patent filed July 31, 1996. According to the appellant, this application is a continuation of Application No. 08/354,718, filed December 6, 1994, now abandoned.

² The examiner's comment on page 2 of the answer that the amendment after final rejection filed July 15, 1996 in parent Application No. 08/354,718 has not been entered appears to be in error. The file record indicates that

(continued...)

We REVERSE.

BACKGROUND

The appellant's invention relates to an extensible door barrier in combination with a door. An understanding of the invention can be derived from a reading of exemplary claim 5, which appears in the opinion section of this decision.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

| | | |
|------------------------------|-----------|---------------|
| Pyle | 671,414 | Apr. 2, 1901 |
| Warfel | 1,204,833 | Nov. 14, 1916 |
| Hutchinson, Jr. (Hutchinson) | 1,716,060 | Jun. 4, 1929 |
| Christison | 2,455,112 | Nov. 30, 1948 |

The following rejections are before us for review.

1. Claims 5, 7-15 and 17-20 stand rejected under 35 U.S.C.

§ 103 as being unpatentable over Christison in view of Hutchinson.

²(...continued)

the amendment was entered, pursuant to the appellant's request to do so on page 2 of the "Request for File Wrapper Continuing Application under 37 CFR § 1.62" filed July 31, 1996. In any event, based on the examiner's answer (page 3) and the appendix to the reply brief filed April 17, 1998 (Paper No. 30), there is no dispute as to the claims involved in this appeal.

2. Claims 2 and 16 stand rejected under 35 U.S.C. § 103 as being unpatentable over Christison in view of Hutchinson, as applied above, and further in view of Pyle.

3. Claims 5, 7-15 and 17-20 stand rejected under 35 U.S.C. § 103 as being unpatentable over Warfel in view of Hutchinson.

4. Claims 2 and 16 stand rejected under 35 U.S.C. § 103 as being unpatentable over Warfel in view of Hutchinson, as applied above, and further in view of Pyle.

Reference is made to the brief (Paper No. 28) and reply brief (Paper No. 30) and the answer (Paper No. 29) for the respective positions of the appellant and the examiner with regard to the merits of these rejections.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims³, to the applied prior art references, and to the

³ In claims 9 and 15, the "opening of said door" (emphasis added) lacks clear antecedent basis. Specifically, the claims recite an opening "between the door and the door frame" and not an opening "of said door." While this informality does not render the claims indefinite, it is deserving of

(continued...)

respective positions articulated by the appellant and the examiner. As a consequence of our review, we make the determinations which follow.

Before addressing the examiner's rejections based upon prior art, it is essential that the claimed subject matter be fully understood. Analysis of whether a claim is patentable over the prior art under 35 U.S.C. §§ 102 and 103 begins with a determination of the scope of the claim. The properly interpreted claim must then be compared with the prior art. Claim interpretation must begin with the language of the claim itself. See Smithkline Diagnostics, Inc. v. Helena Laboratories Corp., 859 F.2d 878, 882, 8 USPQ2d 1468, 1472 (Fed. Cir. 1988). Accordingly, we will initially direct our attention to appellants' claim 5 to derive an understanding of the scope and content thereof.

Claim 5 reads as follows:

An extensible doorway barrier **for deterring passage through an opening of a door, the door mounted to a door frame**, said barrier comprising:

³(...continued)
correction in the event of further prosecution before the examiner.

flexible material means **for spanning a lower portion of the otherwise unobstructed opening of said door** to provide a visual barrier deterring egress of pets or small children **while leaving an upper portion of the opening unobstructed**, said flexible material means yielding downwardly in response to weight of a child or pet attempting to climb the flexible material means;

a reel attached to a proximal end of said flexible material means for storing said flexible material means and paying out said flexible material means **as the door is opened**, said reel adapted for attachment to one of said door frame and said door on a side thereof proximate to the door opening;

rewinding means associated with said reel for maintaining tension in said flexible material means **during opening of the door**, for facilitating said yielding downwardly in response to weight of said flexible material means, and for automatically rewinding said flexible material means onto said reel as the door is closed; and

attachment means connected to a distal end of said flexible material means and adapted for connection to at least one attachment point on the other of the door frame and the door, proximate to the door opening, for permitting manual attachment of said distal end to, and removal of said distal end from, said attachment point [emphasis added].

Where words in the preamble of a claim are essential to point out the invention defined in the claim, those words do constitute a limitation which must be accorded weight in

interpreting the scope of the claim. See Kropa v. Robie, 187 F.2d 150, 152, 88 USPQ 478, 481 (CCPA 1951).

In the case of appellant's claim 5, the language in the body of the claim shown in bold above appears to us to incorporate the door mentioned in the preamble as part of the claimed invention because incorporation of the door is essential to permit one of ordinary skill in the art to understand what is meant by the limitations shown in bold and, hence, what structure is required to meet those limitations. Moreover, as the door is further limited in the preamble as being "mounted to a door frame," this limitation is further incorporated as part of the claimed invention. See Bell Communications Research, Inc. v. Vitalink Communications Corp., 55 F.3d 615, **620**, 34 USPQ2d 1816, 1820 (Fed. Cir. 1995) (In a claim reciting in the preamble a "method for transmitting a packet . . . said packet including a source address and destination address," the steps of broadcasting "said packet" and associating an identifier with "said packet" in the body of the claim were held to have incorporated by reference the preambular phrase "said packet including a source address and destination address." As a result, the

claim was held to be limited to a method for transmitting packets having both source and destination addresses.).

For the above reasons, we interpret claim 5 as being directed to a combination of an extensible doorway barrier and a door mounted to a door frame. This is consistent with the appellant's arguments in the brief, which read as follows:

Hutchinson, Christison, and Warfel do not suggest a flexible material structure which spans a lower portion of an *otherwise unobstructed opening* of a door . . . while leaving an upper portion of the opening unobstructed to allow deliveries. None of these references suggests a device where the flexible material is paid out as the door is *opened* and rewound as the door is *closed* [brief, page 12].

[T]here is no suggestion in any reference of mounting a reel and attachment on the *opening side* of the door frame so that the material spans the door opening, rather than the door itself as taught by Hutchinson. For these reasons, the proposed combinations ultimately fail to create a structure similar to that of the amended claims [brief, pages 13 and 14].⁴

That claims 9 and 15, the remaining independent claims on appeal, are also directed to the combination of a door mounted

⁴ The appellant expressly indicates that these arguments apply to independent claim 5, as well as to independent claims 9 and 15 (brief, page 23).

(movably or swingably) to a door frame, we think, requires no discussion.

Turning now to the examiner's rejection of claims 5, 7-15 and 17-20 under 35 U.S.C. § 103 as being unpatentable over Christison in view of Hutchinson, we note that Christison discloses a burglar proof door guard comprising an extensible gate including vertical members (16-18) and toggles or links (19) pivoted to the vertical members as indicated at (20). The outer vertical member (14) is secured by a pair of hinges (23, 24) and screws (26) to a flat strip (27). The inner vertical member (16) is slidably supported by U bolts (29) fitting about a plurality of horizontal rods (28) mounted to a wall (30). The gate is attached to the door using a pair of links (38, 39) adapted to fit about the door knob handle (13) and a locking ring (46) for locking the links about the knob handle.

The examiner states on pages 3 and 4 of the answer that Christison does not disclose the extensible doorway barrier as comprising an open mesh attached to and stored on a reel, as required by the claims. We further note that Christison lacks "flexible material means for spanning a lower portion of the

otherwise unobstructed opening of said door . . . while leaving an upper portion of the opening unobstructed" as required by all of the independent claims.

Hutchinson discloses a guard (7) comprised of "wire mesh or the like" for use with a conventional toggle-joint elevator guard gate (5) of the 1920's. The outer edge of the guard (7) is bound by means of a strip (10), which is attached to the outer edge of the guard gate (5) by means of rivets or the like. The opposite end of the guard (7) is secured to a roller (13) provided at the bottom with a spindle (14) rotatably mounted in a bracket (15) carried by the elevator wall. A coiled spring is provided in the roller (13) to hold the guard in tension such that it unwinds when the guard gate (5) is closed and re-winds when the gate is opened, without any additional effort by the elevator operator. The purpose of the guard (7) is to prevent umbrellas, canes and the like from becoming jammed within the toggle-joints of the gate (page 1, lines 91-101).

It is the examiner's position that it would have been obvious to use Hutchinson's open mesh (7) attached to and stored on a roller (13) "in lieu of the extensible doorway as

disclosed by Christison for the purpose of substituting a mechanical equivalent for another to obtain the advantages inherent therein, such as precluding the pinching of one's fingers within the links 19 of Christison" (answer, page 4). We do not agree.

As pointed out by the appellant on pages 3 and 4 of the brief, Hutchinson does not teach and would not have suggested provision of the mesh material (7) as a free standing structure for use as a barrier to intruders. On the contrary, Hutchinson would have suggested to one of ordinary skill in the art that the disclosed mesh material (7) would not have been sufficient as a barrier; if the mesh material were considered sufficient, there would have been no need for the guard gate (5). Thus, we agree with the appellant that, even if the teachings of Christison and Hutchinson were combined, the combined teachings would not have suggested replacement of the extensible gate of Christison with the mesh material of Hutchinson. While these references may have suggested provision of an extensible guard comprising a reel of wire mesh mounted to one side of the extensible toggle-joint gate of Christison in a pinch-protecting capacity, such an

arrangement, because of the presence of the extensible gate in addition to the mesh guard, would not result in the flexible material means "spanning a lower portion of the otherwise unobstructed opening of said door to provide a visual barrier deterring egress of pets or small children while leaving an upper portion of the opening unobstructed" as required by the claims.

For the foregoing reasons, we shall not sustain the examiner's rejection of claims 5, 7-15 and 17-20 under 35 U.S.C. § 103 as being unpatentable over Christison in view of Hutchinson.

We have reviewed the teachings of Pyle, but we find nothing therein which overcomes the above-noted deficiencies of the combination of Christison and Hutchinson. It follows then that we shall also not sustain the examiner's 35 U.S.C. § 103 rejection of claims 2 and 16 as being unpatentable over Christison in view of Hutchinson and Pyle.

Turning now to the examiner's rejection of claims 5, 7-15 and 17-20 under 35 U.S.C. § 103 as being unpatentable over Warfel in view of Hutchinson, Warfel discloses a door screen adapted to be applied to a door for holding the door open for

purposes of ventilation and which will at the same time prevent intrusion. It is important to Warfel that the screen serves as a barrier and cannot be detached from the outside. (page 1, lines 8-22). The door screen (3) embodies a pair of overlapping sections (4,5) each provided with a frame and a panel (6), which may be of wire-mesh or of fabric to allow air to pass therethrough. The frames are slidably connected by means of U-shaped clips (7). The screen is further provided with means for attaching the screen to the door knob of the door and to the door casing.

The examiner concedes that Warfel does not disclose the extensible doorway barrier as comprising an open mesh attached to and stored on a reel, but contends that to use the open mesh material (7) of Hutchinson "in lieu of the extensible doorway [barrier] as disclosed by Warfel for the purpose of substituting a mechanical equivalent for another to obtain the advantages inherent therein, such as ease of storing the extensible doorway barrier in a compact configuration, would have been obvious to one of ordinary skill in the art" (answer, page 5).

As discussed above, Hutchinson does not teach and would not have suggested provision of the mesh material (7) as a free standing structure for use as a barrier to intruders and, in fact, would have suggested to one of ordinary skill in the art that the disclosed mesh material (7) would not have been sufficient, alone, as a barrier. Thus, we cannot agree with the examiner that it would have been obvious, in view of the combined teachings of Warfel and Hutchinson, to provide the reeled wire mesh material (7) of Warfel in lieu of the slidable panel arrangement disclosed by Warfel.

Moreover, even assuming that Warfel and Hutchinson would have suggested modification of the Warfel barrier by attachment of the reeled wire mesh material (7) taught by Hutchinson to the frames of the barrier as an auxiliary guard, such an arrangement would still not result in flexible material means "spanning a lower portion of the otherwise unobstructed opening of said door to provide a visual barrier deterring egress of pets or small children while leaving an upper portion of the opening unobstructed" as required by the claims.

Therefore, we shall not sustain the examiner's rejection of claims 5, 7-15 and 17-20 under 35 U.S.C. § 103 as being unpatentable over Warfel in view of Hutchinson.

We have reviewed the teachings of Pyle, but we find nothing therein which alters our view with regard to the combination of Warfel and Hutchinson. Thus, it follows that we shall also not sustain the examiner's 35 U.S.C. § 103 rejection of claims 2 and 16 as being unpatentable over Warfel in view of Hutchinson and Pyle.

CONCLUSION

To summarize, the decision of the examiner to reject claims 2, 5 and 7 through 20 under 35 U.S.C. § 103 is reversed.

REVERSED

| | | |
|-----------------------------|---|-----------------|
| IAN A. CALVERT |) | |
| Administrative Patent Judge |) | |
| |) | |
| |) | |
| |) | |
| |) | BOARD OF PATENT |
| IRWIN CHARLES COHEN |) | APPEALS |
| Administrative Patent Judge |) | AND |
| |) | INTERFERENCES |
| |) | |
| |) | |
| JENNIFER D. BAHR |) | |
| Administrative Patent Judge |) | |

Appeal No. 1999-0635
Application No. 08/688,825

16

JDB/pgg

Evan R. Smith
Sixbey, Friedman, Leedom and Ferguson
2010 Corporate Ridge
Suite 600
McLean VA 22102